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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GOVERNMENT OF THE VIRGIN ISLANDS,
Petitioner,

v.

JDS REALTY CORPORATION, formerly known as
West Indies Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

The United States Virgin Islands has been, since 1917, an unincorporated territory of the United States. In the last seventy years, Congress has granted certain powers of self-government to the Virgin Islands while imposing specific Constitutional and statutory restrictions on such delegated powers. Congress has never expressly applied or extended the Commerce Clause of the United States Constitution (U.S. Const. art. I, sec. 8, cl. 3) to the Virgin Islands. For over thirty years, the Virgin Islands has levied, pursuant to its Congressionally delegated powers, an excise tax on imported goods. The United States Court of Appeals for the Third Circuit, addressing an importer's request for a refund of that tax, declared the Virgin Islands' excise tax to be invalid as violative of the Commerce Clause.

The Question Presented for review by this Court is:

Whether, absent an express Congressional application, the Commerce Clause of the United States Constitution limits legislation enacted by the unincorporated territory of the United States Virgin Islands.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The United States Virgin Islands ("Virgin Islands"), an unincorporated territory of the United States, petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit holding that the Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3, applies to legislation enacted by the Virgin Islands Legislature.

OPINIONS BELOW

The opinion of the United States District Court of the Virgin Islands invalidating the Virgin Islands excise tax is reported at 593 F. Supp. 199. (App. 14a-29a). The United States Court of Appeals for the Third Cir-

cuit dismissed an initial appeal of the Virgin Islands for lack of an appealable order. 770 F.2d 1071. The district court subsequently entered an appealable order. The opinion of the United States Court of Appeals for the Third Circuit on the Virgin Islands' appeal from the final order is reported at 824 F.2d 256. (App. 1a-11a). That opinion, affirming the district court's invalidation of the Virgin Islands excise tax, is now presented for review by this petition for a writ of certiorari.[1]

JURISDICTION

The opinion of the court of appeals affirming the district court judgment was entered on July 24, 1987 and the certified judgment in lieu of mandate was entered on August 17, 1987. (App. 12a-13a). No petition for rehearing or rehearing *en banc* was filed. This petition was filed within 90 days of the court of appeals decision. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the United States Constitution, notably the Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3) and the Territorial Clause (U.S. Const. art. IV, sec. 3, cl. 2). In addition, it concerns at least two federal statutes, the Revised Organic Act of the Virgin Islands, as amended (Pub. L. No. 83-517, ch. 558, 68 Stat. 497 (1954) (codified at 48 U.S.C.

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[1] Respondent JDS also appealed a separate district court order denying its request for a refund. The United States Court of Appeals for the Third Circuit affirmed that decision. (App. 30a-31a). That decision is not now before this Court.

[2] Because the Virgin Islands is not a State, an appeal to this Court does not lie under 28 U.S.C. § 1254(2) (1982). *See Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (Puerto Rico is not a "State" entitled to appeal to this Court under 28 U.S.C. § 1254(2)).

§ 1541 *et seq.* (1982 and Supp. III 1985)) and Authorization Appropriations—Insular Areas of the United States, Act of March 12, 1980, Pub. L. No. 96-205, § 405, 94 Stat. 89 (1980) (as amended by Act of October 19, 1982, Pub. L. No. 97-357, § 302, 98 Stat. 1709 (codified at 48 U.S.C. § 1574 note (1982)). Finally, it also involves an excise tax enacted by the Virgin Islands Legislature (33 V.I.C. § 42(a) (1967)). All of these Constitutional, Congressional, and Territorial provisions are set forth in the Appendix. (App. 32a-36a).

STATEMENT OF THE CASE

This case concerns the judicial application of the negative implications of the Commerce Clause to invalidate legislation of the unincorporated Territory of the Virgin Islands—an application never before made by this Court, by the Constitution itself, or by Congress. For this Court to decide whether to review that decision, a brief review of the seventy-year history of Congressional oversight of the Virgin Islands, the particular excise tax at issue here, as well as the opinions below is required.

A. History Of Congressional Oversight Of The Virgin Islands

The United States acquired the Virgin Islands in 1917 from Denmark. 39 Stat. 1706 (codified at 48 U.S.C. § 1541(a) (1982)). Since that time, the Virgin Islands has been an unincorporated territory of the United States, a status expressly confirmed by Congress. *Id.* In 1936, Congress first codified the rights of the Virgin Islands Government to enact legislation. Organic Act of the Virgin Islands of June 22, 1936, ch. 699, § 36, 49 Stat. 1816 (codified at 48 U.S.C. § 1406i (1982)). That "'makeshift' Organic Act of 1936" proved to be "unnecessarily cumbersome and inefficient" and, as a result, Congress exercised its Constitutional responsibility to

change it. S. Rep. No. 1271, 83d Cong., 2d Sess. 1, 2 (1954) ("S. Rep. 1271").

In amending the Congressional delegation of authority to the Virgin Islands, the Revised Organic Act of 1954, Pub. L. No. 83-517, ch. 558, 68 Stat. 497, 48 U.S.C. § 1541 *et seq.* (1982 and Supp. III 1985) ("Revised Organic Act"), represented a "clear legislative intent that the [1954 Act] should become a new basic charter of government for the territory and . . . should grant 'a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands.'" *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 576 (3d Cir. 1967), *cert. denied*, 390 U.S. 1041 (1968) (*citing* S. Rep. 1271, *supra*).

The Revised Organic Act of 1954 has been amended on several occasions, each time to expand the Virgin Islands' autonomy. In 1958, Congress, reacting to a ruling of this Court in *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955), which narrowly construed the Virgin Islands' legislative authority under the 1954 mandate, expanded the Territory's legislative charter to "all rightful subjects of legislation not inconsistent with this chapter or the laws of the United States made applicable to the Virgin Islands." Virgin Islands Revised Organic Act—Amendments, Pub. L. No. 85-851, § 2, 72 Stat. 1094 (codified at 48 U.S.C. § 1574(a) (1982)). That revision was intended to broaden the Territory's legislative power to "the ordinary area of sovereign legislative power as limited and circumscribed by the Revised Organic Act or the laws of the United States made applicable to the Virgin Islands." S. Rep. No. 2267, 85th Cong., 2d Sess. 2 (1958). At the same time, Congress reminded the Territory that Congress "retains, of course, the power to disapprove, modify, and supercede any and all acts of the Territorial legislature." *Id.*

Congressional legislation in the next twenty years continued to expand and refine the Virgin Islands authority

to legislate its own affairs. As the Third Circuit noted only last year, "Congress has steadily increased the scope of self-government granted to the Virgin Islands." *Water Isle Hotel and Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc.*, 795 F.2d 325, 327 (3d Cir. 1986). In expanding Virgin Islands' powers of self-government, Congress has delineated with precision the rights, and limits, of the Virgin Islands Legislature. *See H.I. Hettinger & Co. v. Municipality of St. Thomas and St. John*, 187 F.2d 774, 776 (3d Cir. 1951) (Virgin Islands authority to tax must be derived from Congress because a Territory, unlike a State, has no natural attributes of sovereignty).

On tax matters in particular, Congress has devoted substantial attention to defining the Virgin Islands' authority. It has, generally, provided the Virgin Islands Legislature with authority over "all rightful subjects of legislation." 48 U.S.C. § 1574(a). It has permitted the Legislature to impose customs duties on imported merchandise. 48 U.S.C. § 1574(f)(1). And, in recent appropriations legislation, it confirmed the authority of the Virgin Islands Legislature to collect excise taxes on imported goods and directed U.S. government officials to assist the Virgin Islands in collecting such taxes. Authorization Appropriations—Insular Areas of the United States, Act of March 12, 1980, Pub. L. No. 96-205, § 405, 94 Stat. 89 (as amended by Act of October 19, 1982, Pub. L. No. 97-357, § 302, 96 Stat. 1709 (codified at 48 U.S.C. § 1574 note (1982)) ("Authorization Act").

At the same time, Congress has imposed precise limits on the Virgin Islands taxing and other legislative authority. It has prohibited discrimination against nonresidents in property taxes. 48 U.S.C. § 1574(a). It has, by incorporating the Impairment of Contracts Clause of the Constitution, prevented the enactment of legislation which impairs contracts. 48 U.S.C. § 1561. *See West Indian Co. v. Government of Virgin Islands*, 643 F. Supp. 869, 879 n.9 (D.V.I. 1986), *aff'd*, 812 F.2d

134 (3d Cir. 1987). It has prohibited tax, and other, legislation which violates a person's due process rights or deprives a person of equal protection of the laws. 48 U.S.C. § 1561. *See Port Constr. Co. v. Government of Virgin Islands*, 359 F.2d 663 (3d Cir. 1966) (applying equal protection clause to tax assessment). Congress has also reserved the right to annul *any* act of the Virgin Islands Legislature. 48 U.S.C. § 1574(c). Finally, Congress has generally prohibited the Virgin Islands Legislature from enacting any legislation which is inconsistent with the Revised Organic Act or "the laws of the United States made applicable to the Virgin Islands." 48 U.S.C. § 1574(a). *See generally Paiewonsky*, 384 F.2d at 581-83.

It is clear, however, that Congress has neither explicitly directed the Virgin Islands Legislature to comply with the "negative implications" of the Commerce Clause, nor exercised its power to annul the specific Virgin Islands tax at issue.[3] To the contrary, Congress has carefully imposed on the Virgin Islands Legislature only certain specific provisions of the Constitution. 48 U.S.C. § 1561. While Congress has obligated the Virgin Islands to comply with, for example, the Full Faith and Credit and the Privileges and Immunities Clauses (*id.*, incorporating art. IV, sec. 1 and 2, cl. 1), it has not directed the Territory to comply with comparable obligations imposed by the Constituiton on the States, such as the Commerce Clause.

B. The Virgin Islands Excise Tax

Relying on specific delegations of power from Congress, the Virgin Islands has taxed imports for nearly

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[3] The Commerce Clause, of course, does not explicitly restrain the States from any activity. However, by granting Congress the power to regulate interstate commerce, the Clause has the "negative implication" of preventing state legislation which interferes with interstate commerce. *E.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).

thirty years.[4] The excise tax statute involved in the present case, provided:

> All persons, partnerships, firms, corporations or other business associations, excepting those especially taxed or excluded, importing goods, merchandise or commodities into the Virgin Islands for personal use or disposition in the course of trade or business or for processing, manufacturing or other business purpose shall pay an excise tax on the value of said goods, merchandise or commodities . . . .

33 V.I.C. § 42(a) (1967).[5]

Because of practical difficulties within the Virgin Islands in collecting excise taxes levied under this section, the United States Postal Service and United States Cus-

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[4] St. Thomas and St. John, Virgin Islands, Ordinance, Trade Tax Law of 1953 (1953) enacted an ordinance which imposed various trade taxes on items "brought into the municipality for disposition in the course of trade or business." *Id.* at section 3(b).

The 1954 Revised Organic Act provided that such local laws and ordinances in force at the time of passage of the Act, to the extent not inconsistent with the Act, should continue in force, subject to the Virgin Islands Legislature's power to amend, alter, modify or repeal such measures. 48 U.S.C. § 1574(c).

[5] The 1967 statute was subsequently amended in 1983 which did not change the issue presented in this case. 33 V.I.C. § 42(a) (Supp. 1983) (App. 24a). However, because of the district court action in this case, as well as issuance of a temporary restraining order in a related case enjoining the collection of excise taxes, the excise tax statute was amended in 1984 to provide for the taxation of local goods as well as goods imported for use in business. 33 V.I.C. § 42 (Supp. 1985). The amendment was necessary to allow collection of any taxes to continue pending further judicial review. Refund claims received by the Virgin Islands Bureau of Internal Revenue relating to excise taxes collected prior to the 1984 amendment of 33 V.I.C. § 42 are in excess of $4,500,000, excluding interest. Payment of such claims turns directly on resolution of the question presented for this Court's review. As such, the question "remains one of substantial importance in the administration of the . . . tax laws for earlier taxable years." *Colony, Inc. v. Commissioner of Internal Revenue*, 357 U.S. 28, 32 (1958).

toms Service were directed by Congress in 1982 to assist "in the collection of these taxes." *Authorization Act, supra.*

C. The Decisions Below

From 1977 to 1980, JDS Realty Corporation ("JDS"), a Virgin Islands corporation engaged in the wholesale distribution of liquor, cigarettes, perfumes, and drugs, paid over $1.5 million in taxes on imported goods under the Virgin Islands excise tax statute. In 1980, JDS sought a refund of the excise tax from the Virgin Islands Department of Finance principally on the grounds that a tax on imports, where there was no comparable tax on locally manufactured goods, was not authorized by the Constitution or by the Revised Organic Act. After its request was denied by the Department, JDS filed an action in the Virgin Islands District Court, alleging that the tax violated the Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3), the Import/Export Clause (U.S. Const. art. I, sec. 10), and the Revised Organic Act's proscription against legislation denying equal protection of the laws, 48 U.S.C. § 1561. (App. 2a).

The district court acknowledged that, after "extensive research", it could find no "case squarely and expressly holding that the Commerce Clause imposes upon the taxing power of this Territory the same limitations said Clause imposes upon the parallel powers of the several States." (App. 16a). Nonetheless, the court applied the negative implications of the Commerce Clause to the Virgin Islands because, to do otherwise, would allegedly undermine "fundamental structural limitations on the economic power of the States which lie at the core of our federalism." (App. 18a). The district court next ruled that the Commerce Clause—thus extended by necessary implication—was violated by the excise tax under challenge. That tax, the court held, was "patently violative of the Commerce Clause" because it discriminated against

imported goods in favor of locally manufactured goods. (App. 25a). The district court also ruled that the Import/Export Clause applied to the Virgin Islands and that it, too, was violated by the excise tax. (App. 20a and 28a). Finally, the court found no express Congressional authority for the Virgin Islands excise tax in either the Revised Organic Act or any other statute, although acknowledging that Congress "could permit the Virgin Islands to tax interstate or foreign commerce or otherwise authorize 'the Territorial Legislature to treat citizens of States the way States cannot treat citizens of sister States.'" (App. 22a, *citing Mullaney v. Anderson*, 342 U.S. 415, 420 (1952)).

In effect, the district court viewed the Virgin Islands on the same Constitutional plane as a State, subject to the delimiting dictates of federalism and, specifically, to the negative implications of the Commerce Clause. The district court opinion, however, was silent on why the Virgin Islands should be saddled with the obligations of Statehood without enjoying the benefits attending that Constitutional status.

On appeal, the court of appeals affirmed. (App. 1a-11a). Acknowledging that it had never directly ruled on the question, the court concluded that "the powers granted to Congress by the commerce clause are implicit in the territorial clause." (App. 7a). Hence, the court seemed to suggest that, in exercising its powers under the Territorial Clause to enact legislation over the Virgin Islands, Congress necessarily was applying the Commerce Clause to the Territory. (App. 7a). The court placed the burden on Congress to explicitly disavow the applicability of the Commerce Clause to a territory, rather than follow the "general rule" that unincorporated territories, such as the Virgin Islands, are subject only to those provisions of the Constitution (save for fundamental individual liberties) specifically extended to them by Congress. (App. 7a and 5a). The court then

concluded that Congress had not authorized the excise tax in question (App. 9a) and that it violated the Commerce Clause. (App. 11a).

REASONS FOR GRANTING THE PETITION

The Virgin Islands petitions this Court to issue a writ of certiorari and to reverse the decision below. The decision, in stark conflict with all other circuit courts that have addressed the question, fundamentally errs in applying the Commerce Clause to the unincorporated territories of the United States. The decision, in effect, treats the Virgin Islands as a State, subject to implied Commerce Clause restraints. The Constitution, the Congress, and this Court, however, have defined a different Constitutional status for the unincorporated territories. These territories, including the Virgin Islands, are not subject to the limitations of the Commerce Clause unless Congress affirmatively so directs. Congress has not done so here. Review is thus necessary to settle this important question. The conflict among the circuits, if allowed to remain, could result in the Virgin Islands having lesser powers of self-government than other unincorporated territories and could threaten Virgin Islands' economic development efforts.

A. The Opinion Below Is In Direct Conflict With The Opinions Of All Other Circuits That Have Decided This Issue

The Third Circuit's opinion, by its own admission, contradicts the specific holding of other circuit court precedent. Its holding cannot be sustained, nor its rationale accepted, without an express rejection of the opinions of all other circuits that have settled the question.

The three other courts of appeals that have decided the issue presented here have squarely held that the negative implications of the Commerce Clause do not, of their own force, apply to unincorporated territories. The Ninth

Circuit, in *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1457 (1987), ruled that the Commerce Clause did not apply to Guam's grant of an exclusive airport concession. Rather, because Congress exercises plenary authority over Guam, the court held that Guam was, in essence, an "instrumentality of the federal government", not subject to Constitutional restraints applicable to States. *Id.* at 1286. The Ninth Circuit emphatically rejected the logic employed in the present case by the court below, concluding that Commerce Clause limits on territorial legislation were not necessary to protect Congress' authority to regulate interstate commerce, given Congress' unquestioned authority to veto territorial legislation. *Id.*

The Fifth Circuit, in *United States v. Husband R. (Roach)*, 453 F.2d 1054 (5th Cir. 1971), *cert. denied*, 406 U.S. 935 (1972), held that the negative implications of the Commerce Clause did not bar the appointed Governor of the Canal Zone from discriminating against the operation of certain bus companies between that unincorporated territory and the Republic of Panama. *Id.* at 1059-60. The Court of Appeals observed that the Congressional grant of authority to the President to administer that vital isthmus was sufficiently broad to permit the challenged restrictions. *Id.*

And the First Circuit, in *Buscaglia v. Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947), ruled that an *ad valorem* tax of the Puerto Rican Legislature assessed against imported merchandise was not subject to Commerce Clause scrutiny because Congress had Constitutional responsibility under the Territories Clause to define territorial authority. *Id.* at 807. The court held that the Commerce Clause "adds nothing" and has "no consequential effect", given Congress' plenary power over territories, including—as expressly reserved in the Virgin Islands Revised Organic Act—the power to annul legislation. *Id.*

The court below is the first court of appeals to stray from this line of cases. It specifically rejected *Buscaglia*, dismissing it as "not . . . persuasive." (App. 7a). It did not attempt to distinguish its decision from the contrary holdings of *Sakamoto and Husband R. (Roach)*. The court below effectively provides some unincorporated territories greater powers of self-government than others. Absent explicit Congressional direction, all unincorporated territories of the United States ought to be governed by the same rule of law and subject to the same Constitutional guarantees. The application of the Constitution to these off-shore lands merits consistent interpretation by all U.S. courts.

In short, the conflict between the Ninth, Fifth, and First Circuits, on one hand, and the Third Circuit, on the other, is direct and pronounced.[6] It warrants this Court's resolution.

B. The Question Presented Is Critically Important To The Ability Of The Virgin Islands And Other Unincorporated Territories To Govern Themselves And Will Frequently Recur Until This Court Resolves The Conflict Created By The Decision Below

The decision below, if not corrected by this Court, potentially subjects to refund millions of dollars in excise taxes already collected by the Virgin Islands Government, plus interest. Such a result would put at great

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[6] In addition to these three principal circuit cases conflicting with the opinion below there are a handful of other reported inferior court decisions which, for the most part, serve only to confuse the question. *E.g., Sea-Land Services, Inc. v. Municipality of San Juan*, 505 F. Supp. 533 (D.P.R. 1980) (criticizing *Buscaglia* and ruling that the Commerce Clause applies based on interpretation of the Territories Clause); *Anderson v. Mullaney*, 191 F.2d 123, 128 (9th Cir.), *aff'd*, 342 U.S. 415 (1952) (applying Commerce Clause by implication to Alaska, an *incorporated* territory on its way to Statehood; Organic Act of Alaska applied entire U.S. Constitution). *Cf., Pacific Broadcasting Corp. v. Riddell*, 427 F.2d 519 (9th Cir. 1970) (Guam gross receipts tax not violative of Commerce Clause).

risk the Territory's fiscal stability and inevitably force cutbacks in vital government programs. Beyond the immediate loss of revenue here, the extension of the Commerce Clause subjects any number of other Virgin Islands taxing statutes and economic development efforts to possible challenge. In addition, the decision, if left to stand, will have a chilling effect on the exercise of Congressionally delegated powers by all territorial legislatures to develop their geographically isolated economies in the future. In short, the decision below impairs the ability of the Virgin Islands to govern its own affairs and threatens to alter, by judicial fiat, the established legal relationship between the United States Government and the unincorporated territories.

That legal relationship—rooted in different Constitutional principles than those applicable to the sovereign States—is unique. For each of the territories, there can be no more important question than the extent to which they may govern themselves and legislate their own affairs. This question will necessarily arise with more frequency as a direct result of the dramatic decision by the court below. That decision, on such an important and recurring question, is contrary to the Constitution itself, to this Court's teachings in the seminal "Insular Cases," [7] and to Congress' deliberate legislative designs for the Virgin Islands self-governance.

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[7] The term "Insular Cases" generally refers to a number of Supreme Court decisions, involving the Constitutional status of Puerto Rico and other territories acquired at the conclusion of the Spanish-American War of 1898, rendered during the first part of this century: *see, e.g., De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901). In those cases, the Supreme Court distinguished between "incorporated" territories, which by treaty, statute or other Congressional design form an integral part of the United States and which are ultimately destined for statehood, and "unincorporated" territories, which are geographically removed from the United States and whose ultimate political status is reserved.

The Constitution, of course, does not literally apply the Commerce Clause to unincorporated territories. Since the doctrine of "territorial incorporation" was first announciated in the *Insular Cases*, it has been settled Constitutional law that "the entire Constitution does not extend of its own force to unincorporated areas." *Dorr v. United States*, 195 U.S. 138 (1904); *Torres v. Puerto Rico*, 442 U.S. 465, 469-70 (1979). Indeed, this Court, in resolving questions of the Constitution's applicability to unincorporated territories, has concluded that only certain "fundamental personal rights declared in the Constitution" apply to unincorporated territories without need for explicit adoption by Congress. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922). *See Torres v. Puerto Rico*, 442 U.S. at 469-70; *Northern Marianna Islands v. Atalig*, 723 F.2d 682, 688 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984).

The Constitution, and this Court, have emphasized Congress' role in defining the precise applicability of the Constitution to unincorporated territories. The Constitution provides that Congress shall "make *all* needful Rules and Regulations" concerning the territories. U.S. Const. art. IV, sec. 3, cl. 2. And this Court has, time and time again, looked to Congress as the principal source of Constitutional law in the unincorporated territories. *See, e.g., Dorr*, 195 U.S. at 148.

The Third Circuit, while mindful of the precept that "the guarantees of the Constitution apply to unincorporated territories such as the Virgin Islands only when Congress has stated they are applicable or when fundamental rights are involved," (App. 5a), nonetheless fashioned its own Constitutional doctrine in the decision below. The court mistakenly suggested that the Commerce Clause is so fundamental to our Constitutional scheme of federalism that it, like personal liberties, must necessarily apply to these off-shore lands. (App. 6a). This ruling, if not corrected by this Court, threatens to

erode the Congressionally delegated authority of the Virgin Islands to govern its own affairs and to slow its progress toward economic self-sufficiency.

There should be little doubt that Congress has permitted the Virgin Islands to enact excise tax legislation in order to raise revenues and promote economic development. Nor can it be said that Congress expressly prohibited any distinction between taxes on imports and taxes on locally manufactured goods.[8]

Congress, in the exercise of its Constitutional responsibility, has obligated the Virgin Islands to comply with specifically enumerated Constitutional provisions, and has expressly retained the power to annual territorial legislation. *Compare Mullaney*, 342 U.S. at 420 & n.2 (1952) (entire United States Constitution extended by statute to the incorporated Territory of Alaska). However, Congress, in delegating legislative power to the Virgin Islands Government, has *never* directed that local excise taxes, such as the one at issue here, are subject to Commerce Clause scrutiny. The court below simply erred in imposing, on its own, Constitutional doctrine not expressly sanctioned by Congress.

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[8] Congress certainly could have imposed such a limitation, as it did in a factually similar case involving Puerto Rico. In *West India Oil Co. v. Domenech*, 311 U.S. 20 (1940), this Court found express Congressional consent to a Puerto Rico sales tax imposed on certain imports of oil into that territory. *Id.* at 26-27. Dismissing the challenge to the tax on grounds that it violated various federal revenue statutes as well as the Commerce Clause, the Court found clear authorization for the tax in a Congressional statute that directed the Customs and Postal Services of the United States to assist the Government of Puerto Rico in collecting the tax on imports. That statute, however, specifically provided that "no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico." *Id.* In contrast, Congress also directed the Customs and Postal Services to assist the Virgin Islands in collecting excise taxes on imported articles in the 1982 Amendment —but, pointedly, *without* the non-discrimination clause.

CONCLUSION

For the above reasons, Petitioner, the Government of the Virgin Islands, respectfully urges this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: October 22, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3455

JDS REALTY CORPORATION, formerly known as
WEST INDIES CORPORATION

v.

GOVERNMENT OF THE VIRGIN ISLANDS and
LEROY A. QUINN, Director of Internal Revenue,
Appellants.

On Appeal from the District Court of the
Virgin Islands—St. Thomas
D. Civ. No. 81-183

Argued April 30, 1987

Decided July 24, 1987

Before SEITZ, HIGGINBOTHAM and ROSENN, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

The Government of the Virgin Islands appeals the final order of the district court denying its motion for reconsideration of the order granting summary judgment to plaintiff JDS Realty Corporation (JDS). This court has jurisdiction under 28 U.S.C. §§ 1291, 1294 (1982).

I.

JDS is a Virgin Islands corporation engaged in the wholesale distribution of liquor, cigarettes, perfumes, and

drugs. At least some of its products are imported. In 1980 JDS filed a letter with the Virgin Islands Commissioner of Finance, seeking a refund of the excise taxes it had paid from 1977 to 1980 on goods it imported. After JDS's request was denied, it filed this action with the district court to recover the payment of taxes.

> The excise tax then in effect provided: All persons, partnerships, firms, corporations or other business associations, excepting those especially taxed or excluded, importing goods, merchandise or commodities into the Virgin Islands for personal use or disposition in the course of trade or business or for processing, manufacturing or other business purpose shall pay an excise tax on the value of said goods, merchandise or commodities. . . .

33 V.I.C. § 42(a) (1967).[1] JDS alleged that this tax violated the commerce and import/export clauses of the United States Constitution,[2] and the equal protection clause as applied to the Virgin Islands by the Revised Organic Act of 1954, 48 U.S.C. § 1561 (Supp. 1987).

The district court granted JDS's motion for summary judgment, finding that the excise tax violated both the commerce clause and the import/export clause. *See JDS Realty Corp. v. Government of the Virgin Islands*, 593 F. Supp. 199 (D.V.I. 1984). First, the court held that the two constitutional provisions apply to the Virgin Islands absent an affirmative statement by Congress to the contrary. Second, it found that Congress had not

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[1] The Virgin Islands amended the statute in 1984 to provide for the taxation of local goods as well as goods imported for the use in business. *See* 33 V.I.C. § 42 (Supp. 1985).

[2] The commerce clause of the constitution provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among several States. . . ." Art. I, § 8, cl. 3. The import-export clause provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . . ." Art. I, § 10, cl. 2.

authorized the Territory to impose a tax that violated either clause. Finally, it concluded that the excise tax violated both clauses of the constitution. The Virgin Islands appealed this ruling; this court dismissed the appeal for lack of an appealable order. 770 F.2d 1071 (3d Cir. 1985).

The district court thereafter denied JDS's request for a refund. The court concluded that the evidence demonstrated that JDS had passed the cost of the excise tax to its customers and therefore it was not entitled to a refund. That determination is the subject of a separate appeal by JDS.

The Virgin Islands filed a motion for reconsideration, arguing that the court erred in holding the excise tax unconstitutional. In addition, the Virgin Islands contended that JDS did not have standing to bring this action in light of the district court's conclusion that JDS had not borne the burden of the tax. The court denied the motion. This appeal followed.

II.

The Virgin Islands presents four arguments on appeal.[3] First, it argues that the district court erred in concluding that the commerce clause and the import/export clauses apply to the Virgin Islands. Second, the Virgin Islands asserts that Congress has provided authorization for the challenged tax. Third, it contends that the excise tax was not an impermissible burden on interstate commerce. Finally, it argues that the court erred in ruling on the constitutionality of the tax before the plaintiff had shown that it had borne the burden of the tax.

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[3] In its statement of jurisdiction, the Government asserts that it is challenging the jurisdiction of the district court. Considering this rather obscure statement in the most charitable manner, however, we find that the contention is meritless.

A.

We first address the Virgin Islands' contention that JDS does not have standing to bring this action, and therefore the district court erred in reaching the merits. According to the Virgin Islands, JDS should not have been permitted to argue the merits of this case until it had shown that it had borne the burden of the excise tax.

This claim is without merit. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 200 (1984), the Supreme Court rejected the contention that wholesalers could not challenge an excise tax because they had not demonstrated any economic injury from the tax. First, the Court found that the wholesalers were liable for the tax. *Id.* at 267, 104 S.Ct. at 3053. Second, the Court stated that "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages. . . ." *Id.* Thus, the Court concluded that "[t]he wholesalers plainly have standing to challenge the tax in this Court." *Id.*

Similarly, this case involves a challenge to an excise tax. JDS is responsible for the payment of the tax. Moreover, by taxing only goods imported, the excise tax increased their costs as compared to those businesses that relied solely on local goods. We therefore conclude that JDS has standing to bring this action.

B.

We turn now to the Virgin Island's claim that the district court erred in concluding that the commerce clause applies to the Virgin Islands. Although this court has assumed that the commerce clause is applicable to the Virgin Islands,[4] we have not directly ruled on this issue.

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[4] *See Virgo Corporation v. Paiewonsky*, 384 F.2d 569, 582 (3d Cir. 1967) (excise tax imposed on production of watches does not violate the commerce clause); *Port Construction Co. v. Government*

The Virgin Islands is by statute, an unincorporated territory. 48 U.S.C.A. § 1541(a) (Supp. 1987). It is well-established that the "entire Constitution does not extend of its own force to unincorporated areas." *Alton v. Alton*, 207 F.2d 667, 670 n.8 (3d Cir. 1953); *see Balzac v. People of Porto Rico*, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627 (1922); *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901). Rather, as a general rule, the guarantees of the constitution apply to unincorporated territories such as the Virgin Islands only when Congress has stated they are applicable or when fundamental rights are involved. *See Balzac, supra*, 258 U.S. at 312, 42 S.Ct. at 348, 66 L.Ed. 627; *Soto v. United States*, 273 F. 628, 633 (3d Cir. 1921). The Virgin Islands argues that because Congress has not explicitly extended the commerce clause to the Virgin Islands, and because the clause does not involve a fundamental right, the district court erred in holding that the commerce clause restricts the powers of the Virgin Islands government.

Congress has plenary power to enact all "needful rules and regulations" for territories of the United States. U.S. Const., Art. IV, § 3, cl. 2. Pursuant to this power, Congress enacted the Revised Organic Act of 1954, which provides, among other things, for the extension of certain constitutional guarantees to the Virgin Islands. 48 U.S.C.A. § 1561 (Supp. 1987). Section 1561, the Virgin Island's Bill of Rights, provides for Virgin Islands residents many of the protections against unreasonable governmental action that the constitution provides. Because this section is concerned with the rights of Virgin Islands residents as against the Virgin Islands government, how-

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of the Virgin Islands, 359 F.2d 663, 665 (3d Cir. 1966) (gross receipt tax does not violate the commerce clause); *Southerland v. St. Croix Taxicab Assn.*, 315 F.2d 364, 368-69 (3d Cir. 1963) (franchise agreement between the government and a taxicab association is invalid under the commerce clause).

ever, it is not surprising that Congress did not include the commerce clause in its enumeration of applicable constitutional guarantees.

The commerce clause is an affirmative grant of power to Congress. At the same time, the clause "limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980); *see, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534-38, 69 S.Ct. 657, 662-65, 93 L.Ed. 865 (1949). The commerce clause thus serves to protect national power against encroachment from local governments. *See, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92, 104 S.Ct. 2237, 2242-43, 81 L.Ed.2d 71 (1984).

We do not believe that Congress's silence in the Revised Organic Act leads to the conclusion that the clause does not restrict the powers of the Virgin Islands government. The Supreme Court has consistently required that Congress express its intention to insulate state legislation from a commerce clause attack before the Court will uphold the legislation. *See, e.g., South-Central Timber Development, supra*, 467 U.S. at 88-90, 104 S.Ct. at 2240-42, 81 L.Ed.2d 71 and cases cited therein. That the Virgin Islands is an unincorporated territory is of no consequence in terms of the constitution's grant of affirmative power to Congress to regulate interstate commerce. *See Sea-Land Services, Inc. v. Municipality of San Juan*, 505 F. Supp. 533, 544-45 (D.P.R. 1980); *Duty Free Shoppers, Ltd. v. Commissioner*, 464 F. Supp. 730, 734 (D. Guam 1979).

The Virgin Islands urges us to follow *Buscaglia v. Ballester*, 162 F.2d 805 (1st Cir. 1947), in which the court found that the commerce clause did not apply to Puerto Rico. The court reasoned that because Congress has the comprehensive power to regulate territories under the

territorial clause. Art. IV, § 3, cl. 2, the powers granted to Congress by the commerce clause are unnecessary when dealing with a territory.

We do not find the *Buscaglia* court's reasoning persuasive. It does not follow from the fact Congress has the power to regulate the territories that the powers conferred on Congress by the commerce clause are not applicable to unincorporated territories. Moreover, it is worth noting that the effect of countenancing the Virgin Islands argument is that an unincorporated territory would have more power over commerce than the states possess.

We conclude that the powers granted to Congress by the commerce clause are implicit in the territorial clause. *See Sea-Land Services, supra*, 505 F. Supp. at 545. We hold, therefore, that the commerce clause applies to the Virgin Islands, absent an express statement to the contrary from Congress.

C.

The Virgin Islands contends that even if the commerce clause does apply to the Virgin Islands, the excise tax may not be challenged under the commerce clause because Congress has given express authorization for the tax. It is well established that "Congress may 'redefine the distribution of power over interstate commerce' by 'permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible.' " *See South-Central Timber Development, Inc., supra*, 467 U.S. at 87-88, 104 S.Ct. at 2240, 81 L.Ed.2d 71, quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945). In order to find such authorization, Congress must have " 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343, 102 S.Ct. 1096, 1102, 71 L.Ed.2d 188 (1982), quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 66 S.Ct. 1142, 1154, 90 L.Ed. 1342 (1946). Moreover, the statement of con-

gressional intent must be unambiguous. *Maine v. Taylor*, —— U.S. ——, 106 S.Ct. 2440, 2448, 91 L.Ed.2d 110 (1986).

The Virgin Islands argues that Congress authorized the challenged tax in Public Law 96-205, enacted in 1980. This statute provides:

> Any excise taxes levied by the Legislature of the Virgin Islands may be levied and collected as the Legislature of the Virgin Islands may direct as soon as the articles, goods, merchandise and commodities subject to said tax are brought into the Virgin Islands.

Authorization Appropriation-Insular Areas of the United States, Act of March 12, 1980, Title IV, § 405, 94 Stat. 89. In 1982 this statute was amended to provide for the assistance of United States Customs and Postal Services officials in the collection of such excise taxes. Act of October 19, 1982, Title III, § 302, Pub.L. 97-357, 96 Stat. 1709. The Senate Report to the 1982 amendment explained the purpose of the statute as follows:

> The need for [this] provision arose as a result of section 405 of Public Law 96-205 *which authorized the Virgin Islands to levy excise taxes on goods at the point at which the goods entered the territory.* Officials of the Virgin Islands requested assistance from the Postal Service for permission to take down the names and addresses from packages. . . . To clarify that the authorization is directed at those excise taxes levied on goods at the time they are brought into the territory, the amendment modifies the language of S. 1674 to refer directly to section 405 of Public Law 96-205.

S. Rep. No. 97-372, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 3278, 3281 (emphasis added).

The Virgin Islands also relies on the following statement by Senator Johnston for support that Congress authorized the imposition of the excise tax.

> The next amendment offered by the House would provide specifically that the Virgin Islands may levy excise taxes on articles as soon as they are brought into the Virgin Islands. This authority already exists and has existed so long as the Virgin Islands has been authorized to collect excise taxes. The amendment is offered only to prevent needless litigation and confirm the already authorized powers of the Virgin Islands government.

126 Cong. Record 114 (February 28, 1980).

We agree with the district court that the fact Congress has authorized the imposition of excise tax on goods at the time they are imported does not "constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Sporhase v. Nebraska*, 458 U.S. 941, 960, 102 S.Ct. 3456, 3466, 73 L.Ed.2d 1254 (1982). The statute relied on by the Virgin Islands may be read as merely providing authorization for the collection of taxes when the goods are imported.

There simply is no indication from the legislative history that Congress intended Public Law 96-205 "to alter the limits of state power otherwise imposed by the commerce clause." *Maine v. Taylor, supra*, —— U.S. at ——, 106 S.Ct. at 2448, 91 L.Ed.2d 110, quoting *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 304, 73 S.Ct. 706, 712, 97 L.Ed. 1020 (1953). Because an "unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation," *Maine v. Taylor, supra*, —— U.S. at ——, 106 S.Ct. at 2448, 91 L.Ed.2d 110, we cannot conclude that Congress exempted the excise tax from a constitutional challenge.

D.

Having decided that the commerce clause applies to the Virgin Islands and that Congress has not exempted the excise tax from a commerce clause challenge, we must next decide whether the excise tax does in fact violate the commerce clause. "A cardinal rule of Commerce Clause jurisprudence is that '[n]o State, consistent with the Commerce clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus, supra*, 468 U.S. at 268, 104 S.Ct. at 3053, 82 L.Ed.2d 200, quoting *Boston Stock Exchange v. State Comm'n*, 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977), quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421 (1959). The Virgin Islands argues that the excise tax is constitutional because the tax applies only to Virgin Islands merchants and therefore does not burden interstate commerce.

This argument is without merit. In *Bacchus*, the Supreme Court held that Hawaii's twenty percent tax on liquor sales that exempted the sale of certain locally-produced liquors violated the commerce clause. First, the court found that the effect of the exemption was "clearly discriminatory, in that it applies only to locally produced beverages." *Bacchus, supra*, 468 U.S. at 271, 104 S.Ct. at 3055, 82 L.Ed.2d 200. Second, the Court rejected the contention that the exemption was not discriminatory because the burden of the tax was borne by Hawaiian consumers. Because the Hawaiian legislature attempted to bolster local industry by imposing a discriminatory tax on imported goods, the Court concluded that the exemption violated the commerce clause.

In this case, as in *Bacchus*, the only asserted reason for the excise tax is to encourage local industry. 593 F. Supp. at 206. Although this is a legitimate goal, *Bacchus, supra*, 468 U.S. at 271, 104 S.Ct. at 3055, 82

L.Ed.2d 200, the State may not pursue this goal in a way that has a discriminatory effect on goods from other states. *See Walling v. Michigan*, 116 U.S. 446, 455, 6 S.Ct. 454, 457, 29 L.Ed. 691 (1886). Moreover, it is irrelevant that the burden falls on Virgin Islands merchants and consumers because the tax clearly "favor[s] local businesses over out-of-state-businesses" by imposing a tax only on imported goods. *Bacchus*, *supra*, 468 U.S. at 272, 104 S.Ct. at 3055, 82 L.Ed.2d 200.

The excise tax has the purpose and effect of making state-side goods more expensive in order to stimulate the local economy. As the district court noted, "[w]e are hard pressed to imagine a taxing scheme more patently violative of the Commerce Clause than the one before us." 593 F. Supp. at 206. Because the challenged excise tax has a discriminatory purpose and effect, we hold that it violates the commerce clause of the United States Constitution.[5]

III.

The judgment of the district court will, therefore, be affirmed.

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[5] Because we conclude that the tax violates the commerce clause, it is unnecessary for us to address the Virgin Island's argument that the district court erred in concluding that the import/export clause applies to the Virgin Islands. *See Bacchus*, *supra*, 468 U.S. at 273 n. 11, 104 S.Ct. at 3056 n. 11, 82 L.Ed.2d 200.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3455

JDS REALTY CORP., formerly known as
WEST INDIES CORP.

vs.

GOVT. OF THE V.I. and LEROY A. QUINN
GOVERNMENT OF THE VIRGIN ISLANDS and
ANTHONY OLIVE, Director of Internal Revenue,
Appellants

(D.C. Civil 81-183)

On Appeal from the District Court of the Virgin Islands
Division of St. Thomas and St. John

Present: SEITZ, HIGGINBOTHAM and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John and was argued by counsel April 30, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court entered June 30, 1986, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

/s/ Sally Mrvos
Clerk

July 24, 1987

Certified as a true copy and issued in lieu of a formal mandate on August 17, 1987.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX C

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION ST. THOMAS AND ST. JOHN

JDS REALTY CORP., formerly known as
WEST INDIES CORP.,
Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS and
LEROY A. QUINN, Director of Internal Revenue,
Defendants.

Civ. No. 81-183

Aug. 24, 1984

MEMORANDUM OPINION

CHRISTIAN, Chief Judge.

In its present posture, this action for refund of excise taxes is before the Court on motion of plaintiff JDS Realty Corp. for summary judgment. On August 14, 1984, we entered an Order granting the motion insofar as said motion challenged the constitutionality of the subject "excise" tax. 33 V.I.C. § 42 (Supp. 1983). In all other respects plaintiff's motion was denied. We write now to clarify our ruling and its constitutional underpinnings.

I

Plaintiff JDS Realty Corp. ("JDS") is a self-described "Virgin Islands corporation engaged in the wholesale

distribution of liquor, cigarettes, perfumes, and drugs." Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 1. The unopposed affidavit of Henry L. Kimelman, chairman of the board of plaintiff corporation throughout the relevant period, establishes, for present purposes, that during the 45 month period from January, 1977, through September, 1980, plaintiff corporation paid $2,046,137.86 in "excise" taxes pursuant to the mandate of 33 V.I.C. § 42.[1] Kimelman's affidavit further avers that said taxes were paid "on various goods primarily alcoholic beverages and tobocco products brought into the Virgin Islands from the United States and various foreign countries." Affidavit [of Henry L. Kimelman] In Support of Plaintiff's Motion for Summary Judgment at ¶ 8. Affiant further declares, upon personal knowledge, that "[n]o comparable tax was paid on goods purchased within the Virgin Islands, including rum manufactured on St. Croix." *Id.* at ¶ 9.

Plaintiff contends that 33 V.I.C. § 42 effectively violates the Commerce and Import/Export Clauses of the United States Constitution, U.S. Const. art. I, § 8, and art. I, § 10, respectively, and discriminates in favor of locally produced goods, and against goods brought into the Territory, in violation of § 4 of the Act of Congress of March 3, 1917 (Act March 3, 1917, Ch. 171, 39 Stat. 1132), and clause 1 of § 3 of the Revised Organic Act of 1954. 48 U.S.C. § 1561.

Defendant Government counters that the Commerce and Import/Export Clauses of the United States Constitution do not limit the inherent taxing power of the Government of the Virgin Islands, or do so only in ways not relevant for present purposes. Alternatively the

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[1] By Memorandum and Order entered October 28, 1981, we held that a letter submitted by plaintiff to the Virgin Islands Commissioner of Finance on January 31, 1980 requesting refund of the subject taxes constituted a claim for refund sufficient to satisfy the pre-filing requirements of 33 V.I.C. § 1692(a).

Government argues that even if said clauses limit territorial powers of taxation, they do not preclude imposition of the challenged excise taxes, at least in part because, as defendant sees it, Congress has implicitly approved territorial collection of said tax. Finally, defendant contends that the challenged tax is impervious to attack on due process and/or equal protection grounds in that the promotion of local industry, defendant's proffered justification for the discriminatory taxing scheme embodied in 33 V.I.C. § 42, is a legitimate governmental objective.

For the reasons set out below we have concluded that the challenged excise tax violates both the Commerce and Import/Export Clauses of the United States Constitution. Collection of said tax thus being impermissible whether the taxed "imports" are "foreign", or "domestic", we need not reach plaintiff's due process/equal protection challenge.[2]

II

Plaintiff has not directed us, nor has our extensive research led us, to any case squarely and expressly holding that the Commerce Clause imposes upon the taxing power of this Territory the same limitations said Clause imposes upon the parallel powers of the several States. Still, the weight of authority overwhelmingly supports such a conclusion.

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[2] Throughout this Memorandum we use the terms "foreign imports" and "domestic imports" as they are defined under 33 V.I.C. §§ 42b and 42c, respectively. Thus "foreign imports" comprise "[a]ll taxable articles, goods, merchandise and commodities having a place of manufacture or origin outside the territorial sovereignty of the United States . . . brought into the Virgin Islands from any place outside the Territory," 33 V.I.C. § 42b(a) (Supp. 1983), while "domestic imports" encompass "[a]ll taxable articles, goods, merchandise and commodities having a place of manufacture or origin within the territorial sovereignty of the United States . . . brought into the Virgin Islands from any place outside the Territory." 33 V.I.C. § 42c(a) (Supp. 1983).

Both this Court and the Court of Appeals for the Third Circuit have repeatedly assumed the applicability of the Commerce Clause in scrutinizing various challenged actions of the territorial government. *See, e.g., Port Construction Co. v. Government of the Virgin Islands*, 5 V.I. 549, 359 F.2d 633 (3rd Cir. 1966); *Alton v. Alton*, 2 V.I. 600, 604 n.5, 207 F.2d 667, 669 n.5 (3rd Cir. 1953); *Pan American World Airways, Inc. v. Government*, 8 V.I. 82, 315 F. Supp. 746 (D. V.I. 1970); *Brinn v. Winter*, 3 V.I. 105, 126 F. Supp. 902 (D. V.I. 1954). *See also, Pan American World Airways, Inc. v. Government of the Virgin Islands*, 459 F.2d 387, 395 (3rd Cir. 1972) (observing that in previous cases the Court of Appeals for the Third Circuit had "presumed, without extensive discussion of the issue, that the commerce clause applied" to the Virgin Islands).

While the assumed applicability of the Commerce Clause was not essential to the result reached in the cases cited immediately above, the holding of the Court of Appeals in *Southerland v. St. Croix Taxi Association*, 315 F.2d 364 (3rd Cir. 1963), is squarely grounded upon the applicability of the Clause. There, the court unequivocally held that the challenged franchise agreement between defendant Taxicab Association and defendant Government "runs afoul of the Commerce Clause of the Constitution." *Id.* at 369.

Despite the foregoing authority, defendant Government contends that the Commerce Clause does not delimit the authority of the Government of the Virgin Islands in that the Clause is neither among those constitutional provisions explicitly made applicable to the Virgin Islands by operation of § 3 of the Organic Act of 1954, 48 U.S.C. § 1561 (Supp. 1984), nor a fundamental personal right guaranteed by the Constitution to all those within its protection, including residents of unincorporated territories. *See, Soto v. United States*, 273 F. 628, 632-34 (3rd Cir. 1921). While defendants factual premises are

accurate, its conclusion that the Commerce Clause is therefore inapplicable to the Virgin Islands ignores the structural role of the Commerce Clause in our federal system.

That Congress has plenary power over the territories by virtue of Article IV, Section 3, Clause 2 of the Constitution cannot be gainsaid. That the Commerce Clause and, for that matter, the Import/Export Clause do not embody fundamental personal rights is self-evident. What defendant fails to grasp is that the constitutional grant to Congress of plenary authority to regulate interstate and foreign commerce substantiates a fundamental principle of our federal system of government.

By holding that both the Commerce and Import/Export Clauses delimit the taxing power of the Government of the Virgin Islands, we do not extend to those residing in this Territory constitutional protection in excess of that contemplated by Congress or guaranteed by the Constitution even to residents of unincorporated territories. Rather, we reach the unremarkable conclusion that a territory devoid of the sovereign power reserved to the States under the Constitution, may not, consonant with the Constitution, disregard fundamental structural limitations on the economic power of the States which lie at the core of our federalism.[3]

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[3] It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446, 6 L.Ed. 678 (1827) (per Marshall, C.J.)

A ruling that a particular tax or regulation violates the Commerce Clause or the Import-Export Clause does not, by design, further the interest of those within the taxing or regulating jurisdiction. The constitutional grant to Congress of plenary authority to regulate interstate and foreign commerce constitutes a structural check on the natural tendency of the various state and territorial governments to legislate from self interest to the economic disadvantage of those politically powerless to influence the policies of the taxing or regulating jurisdiction. As the Supreme Court has recently observed:

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interest within the state." *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2, [58 S.Ct. 510, 513 n.2, 82 L.Ed. 734] (1938); see also *Southern Pacific Co. v. Arizona, supra*, [325 U.S. 761] at 767-768 n.2 [65 S.Ct. 1515, 1519 n.2, 89 L.Ed. 1915 (1945)]. On the other hand, when Congress acts, all segments of the Country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce."

South-Central Timber Development, Inc. v. Wunnicke, —— U.S. ——, ——, 104 S.Ct. 2237, 2243, 81 L.Ed.2d 71 (1984).

Our decision, then, does not turn on the constitutional rights of those residing within the Virgin Islands, as defendant seems to suggest. It is, instead, dictated by the Constitution's embodiment of

> a central concern of the Framers that was an immediate reason for calling the constitutional convention; the conviction that in order to succeed the new Union would have to avoid the economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325-6, 99 S.Ct. 1727, 1730-31, 60 L.Ed.2d 250 (1979), *cited with approval in South-Central Timber*, —— U.S. at ——, 104 S.Ct. at 2242. We hold therefore, that the Government of the Virgin Islands cannot disregard with impunity the constitutional restraints imposed on the economic power of our half-sister States by operation of the Commerce and Import-Export Clauses without express Congressional authorization. *Accord Duty Free Shoppers, Ltd. v. Tax Commissioner*, 464 F. Supp. 730, 734 (D.Guam 1979) (concluding "that Guam is bound by the same limitations as bind the states with respect to both the Commerce and Import-Export Clause"). *See also Manila Trading and Supply Company (Guam) v. Maddox*, 335 F.2d 150 (9th Cir. 1964) (holding that the Guam gross receipts tax violated the Commerce Clause as applied to trucks and auto parts destined for the Philippines); and *Sea-Land Services, Inc. v. Municipality of San Juan*, 505 F. Supp. 533, 545 (D. P.R. 1980) (holding that, in the absence of clear congressional authorization to the contrary, "Puerto Rico is constrained by the prohibitory implications of the Commerce Clause as construed by the Supreme Court of the United States"). *But see, Buscaglia v. Ballester*, 162 F.2d 805, 806 (1st Cir. 1947).

III

Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign Commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.[4] *See South-Central Timber*, —— U.S. at ——, 104 S.Ct. at 2240; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2014, 64 L.Ed.2d 702 (1980); *Hughes v. Oklahoma*, 441 U.S. at 326, 99 S.Ct. at 1731; *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-38, 69 S.Ct. 657, 663-65, 93 L.Ed. 865 (1949); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1852). The Import-Export Clause by its terms imposes limitations on state taxing powers: "No State shall, without the Consent of the Congress lay any Imports or Duties on Imports or Exports. . ." U.S. Const. art. I, § 10. The authority of Congress to permit state imposition of otherwise impermissible duties is explicit. "It is equally clear that Congress 'may redefine the distribution of power over interstate commerce' by 'permit[ting] the states to regulate commerce in a manner which would otherwise not be permissible.'" *South-Central Timber*, —— U.S. ——, 104 S.Ct. at 2240, *quoting Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945). *See also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958-60, 102 S.Ct. 3456, 3465-67, 73 L.Ed.2d 1254 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982); *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-55, 101 S.Ct. 2070, 2074-76, 68

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[4] Having concluded that the Commerce Clause delimits the taxing power of this Territory as it does the parallel power of the several states, we consider the terms "state" and "interstate" as used by the Supreme Court throughout the body of case law defining the limit of the taxing power of state government to encompass this territory and its commerce in domestic imports, as well.

L.Ed.2d 514 (1981); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). Moreover, it is settled that Congress, pursuant to its plenary power over the Territories, U.S. Const. art. IV, § 3, Cl. 2, could permit the Virgin Islands to tax interstate or foreign commerce or otherwise authorize "the Territorial Legislature to treat citizens of States the way States cannot treat citizens of sister States." *Mullaney v. Anderson*, 342, U.S. 415, 420, 72 S.Ct. 428, 431, 96 L.Ed. 458 (1952). *See also Duty Free Shoppers*, 464 F. Supp. at 733-34.

Congressional authorization of an otherwise impermissible tax will not, however, be presumed lightly. Whether we view a purported authorization in light of Congress's plenary power over foreign and interstate commerce or its equally plenary power to regulate the territories, the standard is essentially the same. Thus, in those instances in which the Supreme Court has found congressional consent "to the unilateral imposition of unreasonable burdens on commerce," *Sporhase*, 458 U.S. at 960, 102 S.Ct. at 3466, "congressional intent and policy to insulate state legislation from Commerce Clause attack has been 'expressly stated.'" *South-Central Timber*, —— U.S. at ——, 104 S.Ct. at 2242, *quoting Sporhase*, 458 U.S. at 960, 102 S.Ct. at 3466. *See also, New England Power*, 455 U.S. at 343, 102 S.Ct. at 1102; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 n.21, 102 S.Ct. 894, 911 n.21, 71 L.Ed.2d 21 (1982); *Prudential Insurance*, 328 U.S. at 427, 66 S.Ct. at 1153. In other words, "for a state regulation to be removed from the reach of the dormant Commerce clause, congressional intent must be unmistakably clear." *South-Central Timber*, —— U.S. at ——, 104 S.Ct. at 2242. Similarly, "[o]nly the clearest expression of Congressional intent," *Mullaney v. Anderson*, 342 U.S. at 420, 72 S.Ct. at 431, will support a finding that Congress authorized an otherwise impermissible tax pursuant to its Article IV power to regulate matters territorial. Having carefully studied the various

acts of Congress respecting this Territory, we conclude that nothing therein evinces a congressional intent to alter the limits of territorial taxing power otherwise imposed by the Constitution to an extent sufficient to permit the collection of the "excise" tax codified at 33 V.I.C. § 42.

Defendant argues at considerable length that various provisions of this Territory's various Organic Acts implicitly grant the Legislature of the Virgin Islands authority to impose the challenged tax. However, defendant directs us to no express grant and our detailed research into the text and legislative history of the various acts of Congress touching this Territory reveal that no such express grant has ever been made. As the District Court of Guam recently observed, "[n]o exemption from the Commerce Clause or the Import-Export Clause will be implied from the mere existence of an organic act which in general terms grants to the new Territory certain powers to tax." *Duty Free Shoppers*, 464 F. Supp. at 734. *Accord*, *Anderson v. Mullaney*, 191 F.2d 123, 128, (9th Cir. 1951) *aff'd*, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952).[5]

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[5] While defendant's extended argument regarding implicit congressional authorization merits little discussion, the immediate, if illusory, appeal of defendant's reliance on Authorization Appropriations-Insular Areas of the United States, Act of March 12, 1980, Publ.L. No. 96-205, 1980 *U.S.Code Cong. and Ad.News* (94 Stat.) 89, compels us to address said act.

Title IV, § 405 thereof provides:

> Any excise taxes levied by the Legislature of the Virgin Islands may be levied and collected as the Legislature of the Virgin Islands may direct as soon as the articles, goods, merchandise, and commodities subject to said tax are brought into the Virgin Islands.

The plain meaning of this provision belies defendant's contention that said provision authorizes the Legislature of the Virgin Islands to impose an otherwise impermissible tax. Section 405 is not a grant of taxing power. It merely authorizes the collection of other-

IV

Having concluded that the Commerce and Import/Export Clauses limit the taxing power of the Government of the Virgin Islands, and that Congress has not expressly granted the Territory authority to impose an otherwise impermissible tax, we turn to the constitutional infirmity of 33 V.I.C. § 42.

A

Subsection (a) of section 42 provides, in pertinent part:

> Every individual and every firm, corporation and other association doing business in the Virgin Islands, except those specially taxed, exempted or excluded shall pay an excise tax on all articles, goods, merchandise or commodities *brought into the Virgin Islands* for personal use in a business, for disposition or sale in the course of a trade or business, for processing or manufacturing or for any other business use or purpose, based on the volume or value of any such articles, goods, merchandise, or commodities, as determined according to the provisions of subsections (b) and (c) of this section, according to the following schedule, except on each shipment for which the excise tax is less than five ($5.00) dollars; . . .

33 V.I.C. § 42(a) (Supp. 1983) (emphasis added).

Section 42, by its terms, imposes a tax upon items "brought into the Virgin Islands," while exempting similar, or even identical, items produced within the Territory. Thus, while denominated an "excise" tax, § 42

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wise lawful taxes upon the importation of taxable items into the jurisdiction. It plainly does not authorize the Legislature to discriminate between goods of territorial and extra-territorial origin in the imposition of taxes. No other reading of this provision is supportable.

functionally constitutes a tax on imports, both foreign and domestic. See 6 V.I. Op. Att'y Gen. 78, 79 (1968) ("The act of importing goods into the Virgin Islands for personal use or disposition in the course of trade or business constitutes the event that brings the excise tax provision of section 42(a) of Title 33 of the Virgin Islands Code into operation").

Defendant readily admits that § 42 taxes "a particular kind of merchandise (that which is brought into the territory)." Memorandum of Law in Support of Opposition to Summary Judgment on Behalf of Plaintiff and in the Alternative for Judgment in Favor of Defendants at 3. While we do not question the power of the Government to discriminate among "particular kind[s] of merchandise" in the exercise of its taxing power, it has long been settled

> [t]hat no State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens engaged in the sale therein, or the transportation thereof, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

Guy v. Baltimore, 100 U.S. (10 Otto) 434, 439, 25 L.Ed. 743 (1880) (per Harlan, J.).

We are hard pressed to imagine a taxing scheme more patently violative of the Commerce Clause than the one before us. As the Supreme Court has recently observed, that Court's "cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers." *Bacchus Imports, Ltd. v. Dias*, —— U.S. ——, ——, 104 S.Ct. 3049, 3054, 82 L.Ed.2d 200, (1984). *See, e.g., I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 125, 28 S.Ct. 247, 252, 52 L.Ed. 413 (1908) (invalidating the challenged

tax as "a direct burden upon interstate commerce, since the law of Tennessee in terms discriminated against property the product of the soil of other states brought into the state of Tennessee"); *Walling v. Michigan*, 116 U.S. 446, 455, 6 S.Ct. 454, 457, 29 L.Ed. 691 (1886) (striking down a law imposing a tax on the sale of alcoholic beverages produced outside the State, the Court declared: "A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is in effect, a regulation in restraint of commerce among the States and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States"); *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 277, 23 L.Ed. 347 (1876) (striking down a Missouri statute that "discriminat[ed] in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other States or countries").

Just this past term the Supreme Court struck down a 20% excise tax imposed on the sale of liquor in Hawaii, which tax specifically exempted certain locally produced alcoholic beverages. In doing so the Court observed:

> A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"

Bacchus, —— U.S. at ——, 104 S.Ct. at 3054, *quoting Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977) (quoting, in turn *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457, 79 S.Ct. 357, 361, 3 L.Ed.2d 421 (1969)).

The *Bacchus* Court reiterated that "[a] finding that state legislation constitutes 'economic protectionism' may

be made on the basis of either discriminatory purpose . . . or discriminatory effect." *Bacchus*, —— U.S. at ——, 104 S.Ct. at 3055 (citation omitted). *See Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 352-53, 97 S.Ct. 2434, 2446-47, 53 L.Ed.2d 383 (1977) and *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). There, as here, the only proffered justification for the exemption of locally produced goods was the encouragement of domestic industry. While this is admittedly a legitimate governmental objective, "the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Bacchus*, —— U.S. ——, 104 S.Ct. at 3056. Indeed, "[o]ne of the fundamental purposes of the Clause 'was to insure . . . against discriminating State legislation.'" *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280, 23 L.Ed. 347 (1876), cited with approval in *Bacchus*, —— U.S. at ——, 104 S.Ct. at 3056. Here, as in *Bacchus*, the exemption of locally produced goods is unmistakably discriminatory in that it is based not upon the inherent nature of such goods but upon their locus of origin:

> It has long been the law that States may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. [10 Otto] 434, 443 [25 L.Ed. 743] (1880). Were it otherwise, "the trade and business of the country [would be] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Id.* at 442. It was to prohibit such a "multiplication of preferential trade areas" that the Commerce Clause was adopted. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 [71 S.Ct. 295, 299, 95 L.Ed. 329] (1951).

Bacchus, —— U.S. at ——, 104 S.Ct. at 3057.

B.

The exemption of locally produced goods from the reach of 33 V.I.C. § 42 results in foreign imports, like domestic imports, being taxed not because of their nature, but because of their place of origin. This the Constitution does not permit, absent express congressional authorization: "The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287, 96 S.Ct. 535, 541, 46 L.Ed.2d 495 (1976).

We do not deny that Congress has expressly authorized the Legislature of the Virgin Islands to "impose on the importation of any article into the Virgin Islands for consumption therein a customs duty." 48 U.S.C. § 1574 (f) (1) (Supp. 1984), Revised Organic Act of 1954, § 8(f) (1) (Supp. 1983). We note, however, that Congress has expressly limited the rate of such permissible duty to "6 per centum ad valorem" or the equivalent thereof. 48 U.S.C. § 1574(f) (1) (A) & (B) (Supp. 1984), Revised Organic Act of 1954, § 8(f) (1) (A) and (B) (Supp. 1983). Thus, to the extent that the "excise" tax codified at 33 V.I.C. § 42 is levied against foreign imports in addition to the 6% customs duty authorized by Congress, said "excise" tax, functionally an import duty, violates the Import/Export Clause of the United States Constitution. *See* 33 V.I.C. § 529-532 (Supp. 1983). *Compare* 33 V.I.C. § 42b(d) (2) *with* 33 V.I.C. § 42c(d) (2).

V

For the foregoing reasons we have concluded that the "excise" tax codified at 33 V.I.C. § 42 impermissibly infringes upon the plenary authority of Congress to regulate interstate and foreign commerce in violation of the Commerce and Import/Export Clauses of the United States Constitution. U.S. Const. art. I, §§ 8 & 10. Accordingly, we have granted plaintiff's motion for sum-

mary judgment insofar as said motion sought a declaration of the constitutional infirmity of the challenged tax.

The record before us, however, is wholly inadequate to determine the extent to which plaintiff has suffered compensable injury as a result of the unconstitutional operation of said tax. Accordingly, we have denied plaintiff's motion for summary judgment insofar as said motion sought relief beyond a declaration that the challenged tax cannot withstand constitutional scrutiny. Testimony and arguments concerning damage computation, and any other remaining issues the parties wish to raise, will be entertained at the plenary hearing scheduled for the trial period beginning October 29, 1984. This is a peremptory setting. In short, no continuance will be granted.

VI

In closing we wish to emphasize the narrowness of our holding. To do so we borrow the words of Justice White:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax products manufactured or the business operations performed in any other state.

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 336-37, 97 S.Ct. 599, 610, 50 L.Ed.2d 514 (1977).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3466

JDS REALTY CORPORATION, formerly known as
WEST INDIES CORPORATION,
Appellant

v.

GOVERNMENT OF THE VIRGIN ISLANDS and
LEROY A. QUINN, Director of Internal Revenue

Civil No. 81-183-D. Virgin Islands—St. Thomas
DISTRICT JUDGE: Almeric L. Christian

Submitted Under Third Circuit Rule 12(6)
April 30, 1987

BEFORE: SEITZ, HIGGINBOTHAM, and ROSENN, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by the Appellant, to wit, that (1) the district court abused its discretion in qualifying the Appellee's main witness as an expert, (2) the district court erred in finding that

Appellant passed on the burden of the excise tax to its customers, and (3) the Appellant is entitled to a refund even assuming that it passed on the excise tax, and

It appearing from the record that the first two contentions are without merit, and that the third contention was not raised in the district court, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs shall be taxed against appellant.

By the Court:

/s/ Seitz
Circuit Judge

ATTEST:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

DATED: Jul. 24, 1987

Certified as a true copy and issued in lieu
of a formal mandate on August 17, 1987.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the
Third Circuit

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Article I, Section 8, Clause 3 ("Commerce Clause")

The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article IV, Section 3, Clause 2 ("Territorial Clause")

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

UNITED STATES CODE, TITLE 48
(Revised Organic Act of the Virgin Islands)

Section 1541(a)

The Virgin Islands . . . are declared an unincorporated territory of the United States of America.

Section 1561

No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.

* * * *

The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; article VI, clause 3; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments . . . .

All laws enacted by Congress with respect to the Virgin Islands and all laws enacted by the territorial legislature of the Virgin Islands which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency. [footnote omitted]

Section 1574(a)

The legislative authority and power of the Virgin Islands shall extend to all rightful subjects of legislation not inconsistent with this chapter or the laws of the United States made applicable to the Virgin

Islands, but no law shall be enacted which would impair rights existing or arising by virtue of any treaty or international agreement entered into by the United States, nor shall the lands or other property of non-residents be taxed at a higher rate than the lands or other property of residents.

Section 1574(c)

The laws of the United States applicable to the Virgin Islands on July 22, 1954, including laws made applicable to the Virgin Islands by or pursuant to the provisions of the Act of June 22, 1936 (49 Stat. 1807), and all local laws and ordinances in force in the Virgin Islands, or any part thereof, on July 22, 1954, shall, to the extent they are not inconsistent with this chapter, continue in force and effect until otherwise provided by the Congress: *Provided*, That the legislature shall have power, when within its jurisdiction and not inconsistent with the other provisions of this chapter, to amend, alter, modify, or repeal any local law or ordinance, public or private, civil or criminal, continued in force and effect by this chapter, except as herein otherwise provided, and to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, subject to the power of Congress to annul any such Act of the legislature.

Section 1574(f)(1)

The Legislature of the Virgin Islands may impose on the importation of any article into the Virgin Islands for consumption therein a customs duty. The rate of any customs duty imposed on any article under this subsection may not exceed—

(A) if an ad valorem rate, 6 percentum ad valorem

. . . .

Authorization Appropriations—Insular Areas of the United States, Act of March 12, 1980, Pub. L. No. 96-205, § 405, 94 Stat. 89 (as amended by Act of October 19, 1982, Pub. L. No. 97-357, § 302, 96 Stat. 1709) (codified at 48 U.S.C. § 1574 note (1982):

> Any excise taxes levied by the Legislature of the Virgin Islands may be levied and collected as the Legislature of the Virgin Islands may direct as soon as the articles, goods, merchandise, and commodities subject to said tax are brought into the Virgin Islands. The officials of the Customs and Postal Services of the United States are directed to assist the appropriate officials of the United States Virgin Islands in the collection of these taxes.

VIRGIN ISLANDS CODE, TITLE 33

Section 42(a) (later amended) (33 V.I.C. § 42(a) (1967)).

All persons, partnerships, firms, corporations or other business associations, excepting those especially taxed or excluded, importing goods, merchandise or commodities into the Virgin Islands for personal use or disposition in the course of trade or business or for processing, manufacturing or other business purpose shall pay an excise tax on the value of said goods, merchandise or commodities . . . .